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No. 721

IN THE

# Supreme Court of the United States

**October Term, 1963**

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UNITED STATES OF AMERICA *ex rel.*
SAMUEL TITO WILLIAMS,
*Respondent,*

—against—

EDWIN M. FAY, Warden of Greenhaven Prison,
Stormville, New York,
*Petitioner.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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*To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

EDWIN M. FAY, Warden of Greenhaven Prison, Stormville, New York, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 18th, 1963 reversing the denial of an application for a writ of habeas corpus.

### History

The judgment to which the petition for the writ was addressed was entered in the County Court of Kings County,

New York, on March 2, 1948. By it respondent was convicted of the crime of Murder in the First Degree committed during a burglary in the killing of Selma Graff, a fifteen year old girl. The trial Court disregarded the jury's recommendation of clemency made pursuant to Penal Law, Section 1945-a, and sentenced respondent to be executed.

The judgment of conviction was unanimously affirmed by the Court of Appeals (298 N. Y. 803). That Court, however, certified that in so acting it had necessarily passed on the constitutional question that the sentence and the statutes on which it was based (Penal Law, Sections 1044, 1045 and 1045-a and Code Crim. Pro. Section 482) violated the Fourteenth Amendment to the Federal Constitution in that the Court had imposed the sentence under these statutes upon information supplied by persons by whom the accused had not been confronted and as to whom he had no opportunity for cross-examination or rebuttal. The Court of Appeals held that the Constitution had not been violated. The Court thereafter denied re-hearing (300 N. Y. 460).

An appeal based on this certification was allowed by the Supreme Court of the United States pursuant to 28 U.S.C. 1948 Ed. 1257 (2). The sole question passed upon by the Court was the constitutionality of the statutes as applied in the case and the practice of the sentencing Court thereunder of utilizing ex-parte information concerning the judgment. The Court affirmed the judgment (337 U. S. 241, 93 L. ed. 1337, 69 S. Ct. 1079, with an opinion by Black, J., Rutledge and Murphy, JJ. dissenting, re-hear. den. 337 U. S. 961, 69 S. Ct. 1529, 93 L. ed. 1337 and 338 U. S. 841, 71 S. Ct. 34, 94 L. ed. 514). Despite the restricted nature of the litigation before the Court, Black, J. wrote:

"The narrow contention here makes it unnecessary to set out the facts at length. The record shows a carefully conducted trial lasting more than two weeks in which appellant was represented by three appointed lawyers who conducted his defense with fidelity and zeal. The evidence proved a wholly indefensible murder committed by a person engaged in a burglary * * *.

Appellant was found guilty after a fairly conducted trial * * *."

*Williams* v. *State of New York*, 337 U. S. 241, at pp. 243, 252.

We shall have occasion to return to this quotation later in this petition.

The then Governor of New York Thomas E. Dewey, thereafter commuted the sentence of execution to life imprisonment.

Respondent's next proceeding was to petition the United States District Court for the Northern District of New York for a writ of habeas corpus. The petition was based upon a claim of coercion in the procurement of the confessions introduced in evidence upon respondent's trial in the State Court.

New York opposed the petition upon two grounds.

The first was that because of the limitation of the issue presented to the Supreme Court in the review heretofore mentioned to the question of the constitutionality of the sentencing statutes and the sentence imposed thereunder upon respondent, he had failed to exhaust his State remedies on the issue of coercion, with the result that that question was not properly before the District Court (*Darr* v. *Burford*,

339 U. S. 200; *Ex Parte Hawk*, 321 U. S. 114). The petition was also opposed on the merits of the coercion issue.

The District Court, being of the opinion that the exhaustion requirement could be dispensed with because of respondent's indigence, passed upon the merits; and, deciding adversely to him, issued an order of denial and dismissal (Foley, D.J., *United States* v. *LaVallee*, 170 F. Supp. 582), but granting a certificate of probable cause.

On the appeal, without considering the merits of the controversy the Court of Appeals affirmed the order of the District Court upon the specific ground that the petitioner had not exhausted his State remedies. *United States* v. *LaVallee*, 276 F. 2d 645.

The Court denied respondent's motion for reargument on April 25, 1960. On December 12, 1960 the United States Supreme Court denied his petition for a writ of certiorari (364 U. S. 922).

The New York Court of Appeals denied respondent's motion for reargument of the original appeal on March 29, 1962 (11 N. Y. 2d 838) and on June 25, 1962, the United States Supreme Court denied the petition for the writ of certiorari which he had presented following the denial of reargument by the New York Court of Appeals (370 U. S. 960).

The petition for the issuance of the writ of habeas corpus, from the denial of which the appeal in the Court below was taken, then followed, with the resultant order of the Court of Appeals for the Second Circuit in reversal, which is the subject of the present petition.

## Opinions Below

The District Court opinion is reported in 170 F. S. 582. The opinions of the United States Court of Appeals are reported in 323 F. 2d 65.

## Jurisdiction

The jurisdiction of the District Court was invoked by the respondent under Title 28, Section 2254, United States Code. The jurisdiction of this Court is invoked by petitioner under Title 28, Section 2101 c and d, United States Code, and Rule 22 of the Revised Rules of this Court effective July 1, 1954.

## Question Presented

Petitioner contends that the United States Court of Appeals erred in its judgment holding inadmissible in evidence confessions made by petitioner to police officials and the District Attorney of Kings County upon the ground that his right of due process had been violated as a matter of law because these confessions were tainted by various coercive practices. It is petitioner's contention that the confessions were voluntarily made and, therefore, constitutionally admissible in evidence against petitioner.

## Applicable Constitutional and Statutory Provisions

(1) Constitution of the United States, Fourteenth Amendment, Section 1:

> "* * * Nor shall any State deprive any person of life, liberty or property, without due process of law; * * *"

(2) Constitution of the State of New York, Article 1, Section 6:

> "* * * Nor shall he be compelled in any criminal case to be a witness against himself;
> * * * No person shall be deprived of life, liberty or property without due process of law."

(3) Code of Criminal Procedure of the State of New York (a) Sec. 395:

> "Confession of defendant, when evidence, and its effect.
> A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the District Attorney that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed."

(b) Sec. 165:

> "Defendant, upon arrest, to be taken before Magistrate.
> The defendant must in all cases be taken before the Magistrate without unnecessary delay; and he may give bail at any hour of the day or night."

## Record Facts Material to the Question Presented

### The People's Case

PAULA GRAFF, mother of the deceased girl, described the wounded condition of her daughter (169)*, when she was

* References are to folios in the case on appeal in the New York Court of Appeals, a copy of which will be made available to the Court if desired.

discovered upon the mother's return home late in the night of April 19, 1948. Later that month while confronting appellant, she asked him "Why did you kill her?" (176) and he answered "I didn't mean it."

DONALD GRAFF, the ten year old brother of the deceased (253), was awakened from his sleep by his sister's outcry and saw a man assaulting her (266). The assailant also struck the boy (269) who suffered major skull lacerations (436). He described the man as "probably in his twenties" (278) whose head he was able to see (302); but he did not specifically identify appellant. Cross-examination disclosed that he had previously told the police that the assailant was a white man (308). (Respondent is a Negro). The young witness wore glasses and had been treated with respect to his eye sight (330). The sole lighting in the apartment was in the adjacent foyer and the bedroom in which the assault took place "was rather dark" (340).

*However, the jury were left under no misapprehension concerning the lack of probative value in the boy's testimony by the trial prosecutor's statement that " * * * there is no contention by the People that this witness can identify this defendant or that he ever has"* (398).

PATROLMAN ALEXANDER S. KLUGER, the first officer at the Graff home, made a search of the rear yard and there found a flashlight (450). The police also discovered a twig from a tree, or bush, which had been used to hold down the window shade in a bedroom adjacent to that slept in by the deceased girl and her brother (468). In a nearby yard, they found an iron bar (485). The flashlight head was covered by a piece of paper (514). The bar had on it hair

resembling that of the deceased girl (521) and the twig was similar to that from the lilac bush in the rear of the Graff home (543).

Detective Roger Rooney first spoke to respondent in the afternoon of September 8 (569) and then again in the early evening beginning at about 7:00 o'clock. (He had seen respondent in the precinct about 9:00 o'clock that morning (636)). They were then in the police precinct. (The conversation between them was given in evidence at this point pursuant to a waiver by defense counsel of a premiminary *voir dire* and a reservation of their right to move later in the case to strike out any confession.)

Its substance follows: About 11 o'clock in the evening of April 19th, respondent after drinking some liquor and smoking a marijuana cigarette (584) and finding himself penniless, decided to burglarize some premises. He had with him a flashlight around whose bulb he placed a piece of an orange wrapper. After inspecting various premises, he came to one (the Graffs) which he decided to enter by means of an iron bar which he had found in the yard (586). He did so; and when inside, pulled down the window shade and fastened it with a piece of wood (the twig) which he had found in the yard (588). After searching the bureau drawers of that room, he went into an adjacent bedroom where, while searching the dresser drawers, he was struck by a girl whom he in turn struck (590) many times. As he was leaving, he observed "a little man getting up out of another bed" and struck him also. He did not realize that he had killed the girl until he read the next-morning newspaper accounts (592). He then noticed blood stains on his shoes, and being unsatisfied with his attempts to remove them, threw the shoes away in a rubbish can (593).

Respondent admitted the ownership of the flashlight which had been found in the yard (596). He was certain of its identity because of the orange colored paper inside the glass.

*The only person present with Detective Rooney during the foregoing conversation was Police Captain Sabatino* (599).

The oral confession to the detective was supplemented by respondent's own handwritten confession in which he substantially restated the incidents of the murder. Present at the time of the writing were Detectives Henry Werner and Roger Rooney and Captain Sabatino (606). It was written about 10 o'clock on the evening of Monday, September 8th (699) by respondent of his own free will. The District Attorney did not come to the station house until after this had occurred (700).

Rooney's cross-examination disclosed that respondent was "booked" about 6 o'clock in the morning of Tuesday, September 9th (640). He had been apprehended at about 3 o'clock on the previous morning (643). He was brought to the Felony Court on Tuesday about 10 o'clock in the morning and was there arraigned about Noon after a complaint had been drawn (647). Felony Court was open Sunday morning (648), although not Sunday night (651). The Felony Court was also open Monday morning. Respondent was given food on Monday (659). Rooney saw no marks of physical violence on his face (660), except a purplish "color" on his nose (663). He denied burning respondent with a cigarette (668) and he saw no burns on respondent's body (670). Certain blemishes on respondent's legs disclosed by a photograph were not there when the detective saw him undressed (671, 678). The detective did not

strike respondent (687) or in any way assault him. He did hear respondent shout (689). He saw no other person assault the prisoner (690). He did not suggest the details of respondent's handwritten confession (717-719).

On re-direct examination, Rooney clarified the time factor with respect to respondent's confession to the police. Although he began to talk to the prisoner at about 7:15 P.M. o'clock concerning the flashlight which had been found (820) and did make a reference to the Graff girl (821), it was at about 8:45 P.M. that they began to converse definitely about the killing and between then and 10 o'clock P.M., respondent made his oral confession and began to write out his handwritten confession (821). From 9 o'clock in the morning (of September 8, 1947) on, respondent was provided with food twice (851) up to 9:30 o'clock in the evening.

When Rooney arrived in the precinct at 9 o'clock in the morning, he was ordered by Captain Sabatino not to question the prisoner concerning the Graff killing (856). That order, which he obeyed, was not rescinded until the evening.

Captain James Sabatino arrived at the precinct about 9 o'clock on the morning of September 8th and remained there until midafternoon (871). He returned about 6:30 and in the evening spoke to respondent at about 7 o'clock, and intermittently between that time and 9:15 (883). When he charged Williams with having continuously lied during the day and offered to grant his request (that his mother be sent for) if he would tell the truth, the prisoner agreed to, and did, recount the details of the burglary and murder and his actions subsequent thereto (884-897). Captain

Sabatino testified that his first mention to respondent of the Graff killing was made about 7 o'clock in the evening (897). It was he who had issued the order to his subordinates not to talk to the prisoner concerning the Graff case until later (900). Respondent's mother and stepfather were sent for by the police about 2 o'clock in the afternoon but did not arrive until the evening (907).

Sabatino saw marks on respondent's face (911) but did not see any burns on his body. He did not strike the prisoner, nor did he see anyone do so (915).

On re-direct examination, Sabatino testified that as the morning wore on, he noticed that respondent had difficulty with his legs (1049). Upon inquiry, respondent told him that he suffered from rheumatic fever and asked that a detective be sent to his home to procure medicine which he had there. The detectives were unsuccessful in their quest for it.

JOHN J. CANEVARI, the District Attorney's stenographer verified the accuracy of a typewritten transcript of the confession made by respondent to Assistant District Attorney Perlman on September 9, 1947 beginning about 12:45 A.M. in the presence of seven police officers of varying rank (1245-1386). During the progress of the questioning, respondent went with Mr. Perlman and police officials to various points which he had mentioned as part of his itinerary on the evening of the crime (1345, 1350, 1358) and finally to the scene of the murder (1367). The confession contained a detailed statement of the murder committed during the burglary, including the use of the flashlight, the twig, the iron bar, and finally, the killing (1312). *It is to be noted that the fact of the killing was confessed before the trip of reenactment began* (1345).

Canevari denied under cross-examination that he had been instructed by Mr. Perlman not to take down certain "off the record" matters (1400).

Irving Levine, Selma Graff's brother-in-law, heard his mother-in-law ask respondent "Why did you kill her?" and his answer: "I didn't mean to; I didn't mean to kill her" (1454).

Assistant District Attorney William S. Perlman arrived at the police precinct about midnight of September 8, 1947 (1608) and after talking with Capt. Sabatino for a while directed that the District Attorney stenographer be sent for. He took respondent's confession stenographically and then procured respondent's consent to accompany him to the scene of the homicide (1616). He had promised respondent an opportunity to see his mother before she read newspaper accounts of the crime (1617). On the way to the Graff home, they traversed Williams' itinerary of the murder evening (1619 *seq.*), and in the home, respondent reenacted the homicide (1643-1646). When they returned to the precinct, Mr. Perlman had food sent in for Williams (1647). He asked the prisoner about the limp which he observed and was told that it was due to rheumatic fever (1653). Mr. Perlman had also observed a discoloration of the left eye and a slight swelling of the cheek bone (1658).

When William's mother arrived, the prisoner told her of the killing (1665) but denied an intent to perpetrate it.

Mr. Perlman had also heard Mrs. Graff ask "Why did you kill my Selma?", (1672) and respondent's answer "I didn't mean to do it."

Mr. Perlman's cross-examination disclosed that while he had not asked the prisoner if he had been beaten or other-

wise mistreated, the prisoner had made no complaints of such experiences (1706). Any omissions from the record of questions and answers were on matters which Mr. Perlman did not deem to be important *and occurred after the full confession had been made* (1725). He took respondent's confession without first having seen the written confession to the police (1750). The questions and answers concerning the crime itself were taken "just as you have it on the record" (1732).

Mr. Perlman denied that he had decided "what would be in the statement and what would not be in the statement" (1760). Any omissions from the record came only during the trip about the neighborhood and the reenactment of the crime (1807-1811). The mark which Mr. Perlman observed on respondent's right arm did not appear "to have anything to do with a cigarette. It appeared very natural and normal, something on his skin, his body; the back of his skin, his flesh. That's the way it appeared to me" (1886).

## The Defense

Samuel Tito Williams, eighteen years of age, testified in his own behalf (2043). After a recital of his personal history not here material, he testified to the fact of his arrest at about 3 A.M. on September 8th (2066) and his treatment by the police in the station house from the time of his arrival there (2072-2197). This included blows on many parts of his head and body, some with a rubber hose (2142) to the point where he was reduced to unconsciousness several times (2143). He was burned with lighted cigarettes (2172). The fear which this treatment induced

in him (2225), together with the lack of food and sleep (2150) and these experiences,—and these experiences alone,—compelled him to make the confession suggested to him by the police and the District Attorney (2265).

Respondent's recital of the brutalities practiced upon him constituted a veritable category of horror. We do not detail the elements of this narrative because of our confidence that under well established law, hereinafter to be dwelt upon, governing the action of this Court, the issue is not here open. For the same reason we do not refer to his cross-examination, which the jury rightfully accepted as sufficient to disentitle his defense to credence.

Dr. Frank Levine, physician at the Brooklyn City Prison (2664) testified to respondent's condition at the time of his medical examination. It is important to note that the examination was not made until September 11, 1947, two days after respondent's commitment to that institution. The prisoner then showed a sprain of the left ankle with "a little knob on the outer side of the ankle and abrasions on the right shin; also a small circular burn on the back of the left wrist; crushed abrasion on the back of the neck" (2667). A second examination made two months later, on November 12, 1947, showed other slight marks which respondent claimed to have been the result of burns "received prior to admission" (2668). It is equally important to note that although the physician was in the jail at the time of respondent's admission on September 9th, he made no complaint on that or on the following day (2674), although the doctor was present in the institution and available to prisoners (2677). Dr. Levine testified under cross-examination that these marks were all located on portions of respond-

ent's body which could be reached "with his own hand" (2689). The swelling of the ankle might also be caused by a chronic condition of rheumatic fever (2694).

Lawrence J. Krieger, respondent's attorney during the early stages of the proceeding (2738), observed his condition on September 12, 1947. He too saw the marks on the legs, arms (2742), temple, neck (2744) and swelling and discoloration of an eye (2745). At respondent's request, he conveyed a complaint concerning these matters to Judge Leibowitz (2748) before whom respondent had been arraigned that morning (2738).

**People's Rebuttal**

Detectives Raymond Cullen (2948), Henry Werner (2972), Deputy Chief Inspector Patrick F. Kenny (2985), Captain James Sabatino (2990), Detectives Peter J. Ward (3001) and Roger Rooney (3004) and Patrolman Joseph De Vivo (3029), all testified in rebuttal that neither they nor any one in their presence had subjected respondent to either force or threats.

Morris Wallen, a Correction Officer assigned to the receiving room of the Brooklyn City Prison (3033), was on duty when Williams was admitted to the prison. He asked Williams at the time if he was hurt in any way or wished to see a doctor. The only complaint made was of a swelling of the legs because of rheumatism (3037) and the prisoner stated that he did not wish to see a doctor. He made no complaints concerning police brutality (3039). The officer had noted these facts on the prison records (3050).

DETECTIVE FRANK DE LORENZO was in contact with respondent at the time of his arrest at 2:30 A.M., September 8th. He then noticed that respondent's eyes were puffed and discolored (3067).

## The Court's Charge

In the aspects of the case germane to this appeal, the trial Court charged the jury fully and properly under both State and Federal law on the issue of confession (3434-3437):

> "Our law provides that if a police officer fails or refuses to perform the duty of arraigning a defendant without unnecessary delay, that he is guilty of a misdemeanor. It is for you, gentlemen, to determine from the facts in this case whether or not the arraignment of the defendant was unnecessarily and illegally delayed. In determining that question, you must take into consideration all that transpired between the time the defendant was taken into custody and his arraignment.
>
> If, on the basis of all the facts, you believe there was unnecessary and illegal delay, please understand, gentlemen, that you are only to consider this in connection with the question as to whether or not the admissions made by the defendant were to any extent induced by such illegal delay.
>
> If you decide that such confession or admission was made as the result of fear induced by threats, duress, or violence, or induced by unnecessary and illegal delay in arraignment, the confession or admission so obtained cannot be used against the defendant and is to be disregarded even if you believe it to be true. No confession is admissible unless it is voluntary. Its primary meaning imports a condition of

mind that is free and unconstrained by fear, or inspired by false hope or threats or violence, or by illegal and unnecessary delay in arraignment. At any rate, it is a question of fact for you, the jury, to determine. You also must determine and decide, if you do accept such confessions and decide that it was made voluntarily, whether or not the confessions are true. *Of course, if you decide that the confessions were not voluntary or not true, you must acquit the defendant.*" (Italics ours)

The Court clearly summarized the testimony of the People and of the defendant on these issues (3437-3474).

It is notable that when the trial Court asked if there were any requests or exceptions, respondent's eminent and experienced trial counsel answered: "No exceptions" (3491). Moreover, every one of counsel's requests for additional charges were granted and relevant additional instruction given to the jury (3491-3496), including the charge that wilful and unnecessary delay in arraignment constitutes a misdemeanor for which the offending police officers may be prosecuted (3493).

The Supreme Court of the United States has ruled that it is within the competence and discretion of State courts to determine the wording of instructions upon the involuntary character of confession; and if such instructions fairly raise the question, the requirements of due process are satisfied (*Lyons* v. *Oklahoma*, 322 U. S. 596, 88 L. Ed. 1481).

**Proceedings in the New York Court of Appeals**

On the appeal from the judgment of conviction respondent's brief was limited to two points. One was entitled

"The Confessions were Obtained by Unlawful Methods and were Inadmissible as a Matter of Law". The Court of Appeals by its unanimous affirmance of the judgment rejected this factual claim after its careful scrutiny of the entire record pursuant to its constitutional power in capital cases (New York State Constitution, Article VI, Section 7).

The second point treated of the contention that both the stautes (Penal Law, Sections 1044, 1045, 1045-a and Code Crim. Pro. Section 482), and the practice thereunder of basing the Court's rejection of the jury's clemency recommendation on *ex parte* information, were unconstitutional.

Absent from the brief was the contention made in the United States Court of Appeal that respondent's arraignment in the Kings County Court upon the indictment without the benefit of counsel violated his rights under the Due Process Clause of the Fourteenth Amendment.

## ARGUMENT

### POINT I

**The petition for the writ of habeas corpus was properly denied on the merits. Respondent failed to sustain the burden of proof cast upon him by law.**

We have demonstrated in this petition that respondent's contentions in the Federal Courts were identical with his arguments in the State Court of Appeals, resolving themselves into the assertion that his rights to due process under the applicable provisions of the Fourteenth Amendment to the Federal Constitution were violated by the admission into evidence of the confessions made by him.

The unanimous affirmance of the judgment of conviction by the State Court of Appeals and the dismissal by the Federal District Court of the petition for a writ of habeas corpus left the respondent with but one recourse in the United States Court of Appeals of which he has availed himself in full measure and with complete success: to contend that the jury which found him guilty, New York's Court of Appeals and the Federal District Court all erred so completely in their treatment of his confessions that the United States Court of Appeals, sitting in fact as a jury, must reverse. The persuasiveness of this argument is, of course, shown by the judgment of the Court of Appeals in reversal of the District Court. It is our submission that the error of this reversal is patent.

The error of the Court of Appeals, we submit, is that it disregards the decision of this Court in *Stein* v. *New York*, 346 U.S. 156:

> "Since these convictions may rest in whole or in part upon the confessions, we must consider whether they are a constitutionally permissible foundation for a finding of guilt.
>
> Inquiries on which this Court must be satisfied are: (1) Under what circumstances were the confessions obtained? (2) Has the use of the confessions been repugnant to 'that fundamental fairness essential to the very concept of justice'? Lisenba v. California, 314 U.S. 219, 236, 86 L. ed. 166, 179, 62 S. Ct. 280. The first is identical with that litigated before the trial court and jury. The second is within, if not identical with, those questions considered by the state appellate court. As to both questions, we have the identical evidence that was before both state courts. At the threshold of our inquiry, therefore, lies the question: What, if any, weight

do we give the verdict of the jury, the rulings of the trial judge and the determination of the state appellate court?

Petitioners' argument here essentially is that the conclusions of the New York judges and jurors are mistaken and that by reweighing the same evidence we, as a super-jury, should find that the confessions were coerced. *This misapprehends our function and scope of review*, a misconception which may be shared by some state courts with the result that they feel a diminished sense of responsibility for protecting defendants in confession cases.

Of course, this Court cannot allow itself to be completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding. *But that does not mean that we give no weight to the decision below, or approach the record de novo* or with the latitude of choice open to some state appellate courts, such as the New York Court of Appeals. Mr. Justice Brandeis, for this Court, long ago warned that the Fourteenth Amendment does not, in guaranteeing due process, assure immunity from judicial error. Milwaukee Electric R. & Light Co. v. Wisconsin, 252 U.S. 100, 106, 64 L. ed. 476, 480, 40 S. Ct. 306, 10 ALR 892. *It is only miscarriages of such gravity and magnitude that they cannot be expected to happen in an enlightened system of justice, or be tolerated by it if they do, that cause us to intervene to review, in the name of the Federal Constitution, the weight of conflicting evidence to support a decision by a state court.*

It is common courtroom knowledge that extortion of confessions by 'third-degree' methods is charged falsely as well as denied falsely. The practical problem is to separate the true from the false. Primarily,

and in most cases final, responsibility for determining contested facts rests, and must rest, upon state trial and appellate courts.

A jury and the trial judge—knowing local conditions, close to the scene of events, hearing and observing the witnesses and parties—have the same undeniable advantages over any appellate tribunal in determining the charge of coercion of a confession as in determining the main charge of guilt of the crime. *When the issue has been fairly tried and reviewed, and there is no indication that constitutional standards of judgment have been disregarded, we will accord to the state's own decision great and, in the absence of impeachment by conceded facts, decisive respect.*" (Italics ours.)

In the District Court, Dawson, *D.J.* properly followed the spirit of this decision in a procedure authorized by this Court in *Brown* v. *Allen*, 344 U.S. 443. Since respondent offered no new evidence touching on the issue of voluntariness of the confessions, Judge Dawson decided the question by careful study of the record on appeal in the State Court. He accorded that record the weight to which this Court held it to be entitled when in *Brown* v. *Allen*, *supra*, this Court wrote:

"So far as weight to be given the proceedings in the Courts of the State is concerned, a United States District Court, with its familiarity with State practice is in a favorable position to recognize adequate State grounds in denials of relief by said Courts without opinion. A fortiori, where the State action was based on an adequate State ground, no further examination is required, unless no State remedy for the deprivation of Federal constitutional rights ever existed (citing cases). *Furthermore, where*

> *there is material conflict of fact in the transcripts of evidence as to deprivation of constitutional rights, the District Court may properly depend upon the State's resolutions of the issue.* Malinski v. New York, 324 U.S. 401, 404, 89 L. Ed. 1029, 1032, 65 S. Ct. 781. In other circumstances, the State adjudication carries the weight that Federal practice gives to the conclusion of a Court of last resort of another jurisdiction on Federal constitutional issues. It is not res adjudicata." (Italics ours.)
>
> • • • • •
>
> "The decisive and serious responsibility of compelling State conformity to the Constitution by overturning State criminal convictions, should not be exercised without clear evidence of violation."

Nor is there any doubt that he fulfilled his responsibility by examining the record of the trial with meticulous attention to every detail. Such care and scrutiny is revealed by every line of his opinion and justifies his holding that:

> "The issue of coercion was fairly presented to the jury under proper instructions. The function of a Federal Court is not to sit as a super-jury and as such to conclude that the confession was coerced. Stein v. New York, 346 U.S. 156, 180, 73 S. Ct. 1077, 97 L. ed. 1522 (1953)."

The decision in this Court in *Townsend* v. *Sain*, 372 U.S. 293, casts no doubt upon the propriety of the District Court's procedure in dismissing the petition for the writ of habeas corpus on the basis of the State record of trial. The case at bar involved no one of the six types of State trials or hearings which this Court thus summarized in *Townsend, supra*:

> "We hold that a Federal Court must grant a evidentiary hearing to a habeas applicant under the following circumstances: if (1) the merits of the factual dispute were not resolved in the State hearing; (2) the State factual determination is not fairly supported by the record as a whole; (3) the fact finding procedure employed by a State Court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the State Court hearing; or (6) for any reason it appears that the State trier of fact did not afford the habeas applicant a full and fair fact hearing."

It suffices to say, we submit, that the issue of voluntariness of confession was completely developed and resolved upon the State trial, whose record supports the jury's determination and on which respondent had "a full and fair fact hearing". (Certainly no one is a better judge of the fullness and fairness of the trial than Black, *J.*, see page 4 of this brief.)

The question presents itself: Why did the Federal Court of Appeals, on exactly the same record of trial, reach a diametrically opposite result as to the facts?

Put in another fashion: which reviewers of the facts,—or more accurately still, which deciders of the facts,—were correct in their conclusions: the seven Judges of the State Court of Appeals and the Federal District Judge, or the three Judges of the United States Court of Appeals?

We do not even intimate that justice has only a quantitative basis. Nevertheless, the administration of the criminal justice is not a mechanical matter with conclusions mechan-

ically arrived at. In the last analysis, it depends upon human judgment; and that being so, the opinions of the seven Judges of the State Courts and of the District Judge were, we submit, entitled to, but did not, receive from the Federal Court of Appeals that "great and, in the absence of impeachment by conceded facts, decisive respect" which this Court itself feels bound to give to judgments of State Courts (*Stein* v. *New York*, *supra*).

We turn to the two opinions written in the Court below in order to find the answer to this question.

In the opinion written by Smith, *D.J.*, there is acknowledgement that:

> "The record leaves the impression that Williams grossly exaggerated the story of physical abuse."

The ultimate conclusion of the Court rests upon the compendium of factors relating to the length of interrogation, the delay in arraignment, respondent's repudiation of the confessions when finally arraigned, his youth and physical condition, and,—and this seems to have been the strongest influence upon the decision,—the promise to let him see his mother if the confession was forthcoming.

The opinion by Lumbard, *C.J.* adopts the factors set forth in the opinion by his brother Judge, as well as the analogies drawn by Smith, *C.J.* with *Haynes* v. *Washington*, 373 U.S. 503, *Spano* v. *New York*, 360 U.S. 315, *Leyra* v. *Denno*, 347 U.S. 556, *Ashcraft* v. *Tennessee*, 322 U.S. 143, *United States ex rel. Wade* v. *Jackson*, 256 F. 2d 7, cert. den. 357 U.S. 908, *Turner* v. *Pennsylvania*, 338 U.S. 62, *Haley* v. *Ohio*, 332 U.S. 596; *United States ex rel. Caminito* v. *Murphy*, 222 F. 2d 698, cert. den. 350 U.S. 896.

We do not believe that it would be of service to this Court for us to embark upon an exhaustive analysis of these cases, accompanied by a point-to-point distinction between each of them and the case at bar. We content ourselves with an answer which relies strongly upon the language employed by Black, *J.* when the case was first in this Court upon respondent's appeal from the judgment of conviction pursuant to certiorari allowed by the Court (337 U.S. 241). Despite the restricted nature of the litigation then before the Court, Black, *J.* wrote:

> "The narrow contention here makes it unnecessary to set out the facts at length. The record shows a carefully conducted trial lasting more than two weeks in which appellant was represented by three appointed lawyers who conducted his defense with fidelity and zeal. The evidence proved a wholly indefensible murder committed by a person engaged in a burglary * * *.
>
> Appellant was found guilty after a fairly conducted trial * * *."

We do take note of certain specific factors which appear to have been deeply involved in the opinion of Smith, *C.J.* and which we believe disregarded the law on these points as enunciated by this Court. These were (1) the delay in arraignment in violation of New York's Code of Criminal Procedure, Section 165; (2) William's youth and physical condition; (3) the failure to advise respondent of his right to counsel or of his privilege to remain silent (neither of which in a State Court is an obligation of the police or the prosecutor); (4) the "veiled promise" that he would be permitted to see his mother. With great respect to the Court below and its constitutent three members, we submit that their conclusion, so diametrically opposed to the con-

clusions of the seven Judges of the State Court of Appeals and of the District Judge, are contrary to the summary of the law enunciated by this Court, given by Frankfurter, *J.* in *Culombe* v. *Connecticut*, 367 U.S. 568 in which he wrote:

> "But asking questions is not the lash or the rack, and to say that the argument ex necessitate is not the short answer to every situation in which it is invoked is not to dismiss it altogether. Due process does not demand of the States, in their administration of the criminal law, standards of favor to the accused which our civilization, in its most sensitive expression, has never found it practical to adopt. The principle of the Indian Evidence Act which excludes all confessions made to the police or by persons while they are detained by the police has never been accepted in England or in th[illegible] country. Nor has the principle of the Scottish cases barring the use in evidence of a defendant's incriminating responses to police questioning at any time after suspicion has focused on him. Rather, this Court (in cases coming here from the lower federal courts), the courts of England and of Canada, and the courts of all the States have agreed in holding permissible the receipt of confessions secured by the questioning of suspects in custody by crime-detection officials. And, in a long series of cases, this Court has held that the Fourteenth Amendment does not prohibit a State from such detention and examination of a suspect as, under all the circumstances, is found not to be coercive. See Lisenba v. California, 314 U.S. 219, 86 L. ed. 166, 62 S. Ct. 280; Lyons v. Oklahoma, 322 U.S. 596, 88 L. ed. 1481, 64 S. Ct. 208; Gallegos v. Nebraska, 342 U.S. 55, 96 L. ed. 86, 72 S. Ct. 141; Brown v. Allen, 344 U.S. 443, 97 L. ed. 469, 73 S. Ct. 397; Stein v. New York, 346 U.S. 156, 184, 97 L. ed. 1522, 1542, 73 S. Ct. 1077; Crooker v. California, 357 U.S. 433, 2 L. ed.

2d 1448, 78 S. Ct. 1287; Cicenia v. Lagay, 357 U.S. 504, 2 L. ed. 2d 1523, 78 S. Ct. 1297. And see Townsend v. Burke, 334 U.S. 736, 738, 92 L. ed. 1690, 68 S. Ct. 1252."

He continued:

"The McNabb Case was an innovation which derived from our concern and responsibility for fair modes of criminal proceeding in the federal courts. The States, in the large, have not adopted a similar exclusionary principle. And although we adhere unreservedly to McNabb for federal criminal cases, we have not extended its rule to state prosecutions as a requirement of the Fourteenth Amendment. Gallegos v. Nebraska, 342 U.S. 55, 63, 64, 96 L. ed. 86, 93, 94, 72 S. Ct. 141 (opinion of Reed, J.); Brown v. Allen, 344 U.S. 443, 97 L. ed. 469, 499, 73 S. Ct. 397; Stein v. New York, 346 U.S. 156, 187, 188, 97 L. ed. 1522, 1544, 1545, 73 S. Ct. 1077; cf. Lyons v. Oklahoma, 322 U.S. 596, 597, 598, 88 L. ed. 1481, 1483, 1484, 64 S. Ct. 1208, note 2; Townsend v. Burke, 334 U.S. 736, 738, 92 L. ed. 1690, 1692, 68 S. Ct. 1252; Stroble v. California, 343 U.S. 181, 197, 96 L. ed. 872, 884, 72 S. Ct. 599.

In light of our past opinions and in light of the wide divergence of views which men may reasonably maintain concerning the propriety of various police investigative procedures not involving the employment of obvious brutality, this much seems certain: It is impossible for this Court, in enforcing the Fourteenth Amendment, to attempt precisely to delimit, or to surround with specific, all-inclusive restrictions, the power of interrogation allowed to state law enforcement officers in obtaining confessions. No single litmus-paper test for constitutionality impermissible interrogation has been evolved: neither extensive cross-questioning—deprecated by the English judges;

nor undue delay in arraignment—proscribed by McNabb; nor failure to caution a prisoner—enjoined by the Judges' Rules; nor refusal to permit communication with friends and legal counsel at stages in the proceeding when the prisoner is still only a suspect —prohibited by several state statutes. See Lisenba v. California, 314 U.S. 219, 86 L. ed. 166, 62 S. Ct. 280; Crooker v. California, 357 U.S. 433, 2 L. ed. 1448, 78 S. Ct. 1287; Ashdown v. Utah, 357 U.S. 426, 2 L. ed. 2d 1443, 78 S. Ct. 1354.

Each of these factors, in company with all of the surrounding circumstances—the duration and conditions of detention (if the confessor has been detained), the manifest attitude of the police toward him, his physical and mental state, the diverse pressures which sap or sustain his powers of resistance and self-control—is relevant. The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. Rogers v. Richmond, 365 U.S. 534, 5 L. ed. 2d 760, 81 S. Ct. 735. The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession."

Even in referring to its own constitutional duty to enforce obedience to requirements of due process under the Fourteenth Amendment, this Court has said (*Malinski* v. *New York*, 324 U.S. 401) that:

"We must be deeply mindful of the responsibilities of the States for the enforcement of criminal laws,

> and exercise with due humility our merely negative function in subjecting convictions from state courts to the very narrow scrutiny which the Due Process Clause of the Fourteenth Amendment authorizes."

Or as Mr. Justice Frankfurter wrote in *Watts* v. *Indiana*, 338 U.S. 49:

> "Power of such delicacy and import must, of course, be exercised with greatest forbearance."

We are, we submit, in no sense overstating the problem when we say that the sovereignty of the states—of utmost importance under our Federal structure of government—should not be infringed, except upon compelling necessity and clearest proof; and with proof of such kind as rests neither upon inference nor upon the personal *weltanschaung* of a Judge. With great deference to the Court below, it is our submission that in the case at bar, the sovereignty of the State of New York has been thus adversely affected.

It is our prayer therefore, that the writ of certiorari be allowed in order that the State of New York may in this Court have an opportunity to right a wrong decision.

## CONCLUSION

For all of the foregoing reasons, petitioner respectfully prays that this Court issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review its judgment reversing the denial of respondent's application for a writ of habeas corpus.

Respectfully submitted,

EDWARD S. SILVER
*District Attorney, Kings County*
*Attorney for Petitioner*

WILLIAM I. SIEGEL
*Assistant District Attorney*
*Of Counsel*

Office-Supreme Court, U.S.
FILED
JAN 2 1964
JOHN F. DAVIS, CLERK

No. 721

IN THE

# Supreme Court of the United States

**October Term, 1963**

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UNITED STATES OF AMERICA ex rel.
SAMUEL TITO WILLIAMS,
*Respondent,*

—against—

EDWIN M. FAY, Warden of Greenhaven Prison,
Stormville, New York,
*Petitioner.*

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## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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EDWARD S. SILVER
*District Attorney*
*Kings County*
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*Assistant District Attorney*
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**Judgment of the Unitied States Court of Appeals in and for the Second Circuit dated October 4, 1963, Reversing Order of United States District Court for the Southern District of New York, dated November 8, 1962**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourth day of October one thousand nine hundred and sixty-three.

Present:

HON. J. EDWARD LUMBARD,

*Chief Judge*,

HON. J. JOSEPH SMITH,

*Circuit Judge*,

HON. FREDERICK VP. BRYAN,

*District Judge*.

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UNITED STATES ex rel. SAMUEL TITO WILLIAMS,

Relator-Appellant,

v.

EDWARD M. FAY, Warden, Green Haven Prison, Stormville, New York,

Respondent-Appellee.

---

Appeal from the United States District Court for the Southern District of New York.

*Judgment of the United States Court of Appeals in and for the Second Circuit dated October 4, 1963, Reversing Order of United States District Court for the Southern District of New York, dated November 8, 1962*

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed with directions to issue the writ applied for in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

A true copy.

A. DANIEL FUSARO
Clerk

(SEAL)

## Opinions of the United States Court of Appeals in and for the Second Circuit dated October 4, 1963

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 397—October Term, 1962

(Argued June 18, 1963 Decided October 4, 1963)

Docket No. 27911

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UNITED STATES OF AMERICA ex rel. SAMUEL TITO WILLIAMS,

Appellant,

v.

EDWIN M. FAY, Warden of Greenhaven Prison, Stormville, New York,

Respondent-Appellee.

---

Before: LUMBARD, Chief Judge, SMITH, Circuit Judge, and BRYAN, District Judge.

Appeal by petitioner, imprisoned for life under judgment of New York State Court, from order denying petition for release on writ of habeas corpus, in the United States District Court for th Southern District of New York, Archie O. Dawson, District Judge. 211 F. Supp. 359.

Reversed.

Pasco M. Bowman II, New York, N.Y., for appellant.

William I. Siegel, Assistant District Attorney for Kings County, Brooklyn, New York (Edward S. Silver, District Attorney for Kings County, on the brief) for respondent-appellee.

*Opinions of the United States Court of Appeals in and for the Second Circuit dated October 4, 1963*

SMITH, Circuit Judge.

Relator was convicted of first degree murder in the County Court of Kings County on January 22, 1948. At his sentencing on March 2, 1948, the trial judge refused to follow the jury's recommendation that relator be sentenced to life imprisonment, and on the basis of certain ex parte information, sentenced him to death by electrocution. On direct appeal to the New York Court of Appeals, relator contended that the confessions he had made that were introduced against him at the trial had been coerced and that the sentencing procedure was unconstitutional. The conviction and sentence were affirmed without opinion, *People* v. *Williams*, 298 N.Y. 803, 83 N.E. 2d 698 (1949). The amended remittitur acknowledged that the court had upheld the constitutionality of the New York statutes which permitted the imposition of a death sentence based on ex parte information. *People* v. *Williams*, 298 N.Y. 863, 84 N.E. 2d 446 (1949). Relator appealed to the Supreme Court on this question alone, and his sentence was affirmed. *Williams* v. *New York*, 337 U.S. 241 (1949). However, on November 16, 1949 his sentence was commuted to life imprisonment by Governor Thomas E. Dewey.

The second round of court proceedings was initiated by a petition for a writ of habeas corpus, filed in the District Court for the Northern District of New York, alleging that the confessions admitted at the trial had been coerced. This petition was denied on the merits. *United States ex rel. Williams* v. *LaVallee*, 170 F. Supp. 582 (N.D.N.Y. 1959). We affirmed on the ground that relator had not yet ex-

hausted his state remedies as required by 28 U.S.C. § 2254, expressing no opinion on the merits. *United States ex rel. Williams* v. *LaVallee*, 276 F. 2d 645 (2 Cir. 1960). The Supreme Court dismissed relator's appeal, *Williams* v. *LaVallee*, 362 U.S. 637 (1960), and denied certiorari, 364 U.S. 922 (1960). The New York Court of Appeals denied relator's motion for reargument of the original appeal. *People* v. *Williams*, 11 N.Y. 2d 838 (1962), cert. denied 370 U.S. 960 (1962). A writ of coram nobis was denied by the County Court of Kings County, relator having pursued this remedy at our suggestion on the prior appeal. It is clear that presently existing state remedies are now exhausted; the State makes no argument that they are not. 28 U.S.C. § 2254; *Fay* v. *Noia*, 372 U.S. 391 (1963). Relator again brought his petition, this time in the District Court for the Southern District of New York, and it was again denied on the merits. *United States ex rel. Williams* v. *Fay*, 211 F. Supp. 359 (S.D.N.Y. 1962). He takes this appeal from the order denying his petition. We conclude that this denial was error, that the undisputed facts reveal that relator's confessions were the product of coercion as a matter of law, that the introduction of them against him at trial was a violation of his right to a trial conducted in accordance with the standard of due process of law guaranteed by the Fourteenth Amendment, and that we must therefore reverse and direct that the writ be issued.

The crime for which Williams is now in prison is the slaying of a 15-year old girl during the course of a burglary. The intruder beat her over the head with an iron bar, causing unconsciousness from which she never awakened. Her

10-year old brother was a witness to the crime; he was also struck by the burglar and injured. About 5 months later, on September 8, 1947, at 2:30 A.M., relator was arrested by the police. He is a Negro, then 18 years old, with no prior convictions of crime, but with a history of trouble with law enforcement agencies and social maladjustments. Apparently he had had some high school education, but the record does not reveal how much. Relator's physical condition was poor; he had had rheumatic fever which had caused a weakened heart (resulting in his early discharge from the Navy for medical reasons) and swelling in his legs causing difficulty in walking.

After the arrest, the police brought Williams to the station house where, beginning at 3:30 A.M. on September 8th, he was interrogated continually by relays of police. He was not asked about the crime for which he was eventually convicted until about 7:15 P.M. the following evening—indeed the interrogators were forbidden by their superiors to do so—but was questioned about other unsolved local crimes. At 9:15 P.M., after nearly 18 hours of virtually continuous interrogation, Williams confessed orally. The final persuasion was an intimation by the police that they would allow him to see his mother, for whom he had already asked several times, and a chaplain, if he confessed. Williams made a further written confession at about 10:00 P.M. and inculpatory statements at a stenographically-recorded question-and-answer session with an Assistant District Attorney which was not completed until 3:00 A.M.—roughly 24 hours after the interrogation had begun. Newspaper reporters and photographers were also present at this inter-

view. Here, for the first time, Williams was told in a vague way of his right to remain silent. He was never advised of his right to counsel. Notwithstanding all of these admissions, when finally arraigned the next day, September 9, at about 12:30 P.M., some 34 hours after his arrest, Williams pleaded "Not Guilty."

At trial, the various confessions and inculpatory statements Williams had made constituted the only evidence against him—and the trial court so charged the jury. The murdered girl's younger brother was called by the prosecution and testified that the killer was a white man with "red skin" but recanted this the next day, after, apparently, he had been spoken to by the District Attorney and some detectives; in any event, the State admitted on defense cross examination of this witness that it was not relying on his testimony. Williams' defense was a profession of innocence and an attack on the veracity of the confessions. He testified, and not without some corroboration, to brutal torture by the police which had forced him in despair to confess falsely. The record leaves the impression that Williams grossly exaggerated the story of physical abuse. The police denied anything more than the questioning which we have summarized above. We shall make no further mention of this aspect of the case for whether or not disputed questions of fact are closed to our scrutiny on this proceeding, see *Townsend* v. *Sain*, 372 U.S. 293, 313, 315 (1963), the undisputed facts show coercion under present standards of due process. The trial judge submitted the issue of the voluntariness of the confession to the jury, in accordance with governing New York law. The guilty

verdict was necessarily a finding that the confessions had not been coerced. However, the question is not closed by the jury verdict, as the District Court apparently believed. The ultimate fact of coercion is one to be independently determined by the court on application for a writ of habeas corpus from the undisputed historical facts if no hearing has been had.[1] *Haynes* v. *Washington*, 373 U.S. 503 (1963); *Spano* v. *New York*, 360 U.S. 315 (1959); *Leyra* v. *Denno*, 347 U.S. 556 (1954); *Ashcraft* v. *Tennessee*, 322 U.S. 143 (1944); *United States ex rel. Wade* v. *Jackson*, 256 F. 2d 7 (2 Cir.), cert. denied 357 U.S. 908 (1958). Comparison of the circumstances of relator's detention with the facts of prior decided cases which have found confessions to be coerced makes it plain that under governing law these confessions were not "the voluntary product of a free and unconstrained will", *Haynes* v. *Washington*, *supra* at 514, and that they were therefore inadmissible against him.

In *Turner* v. *Pennsylvania*, 338 U.S. 62 (1949), the accused was apparently a mature man, who was arrested and questioned over a period of 5 days, never more than 6 hours on any one day. He confessed after a total of about 23 hours questioning—roughly the same amount as Williams. It would be mere speculation on our part to try to deter-

[1] Our consideration is not foreclosed by the statement of the Supreme Court on the prior appeal that "appellant was found guilty after a fairly conducted trial." *Williams* v. *New York*, supra, at 252. As we pointed out in our prior opinion, "this does not suffice to demonstrate the Supreme Court's consideration of the issue now posed in light of the parties' silence on the subject and the jurisdictional fact that the Supreme Court is restricted to that ground which sustains its appeal jurisdiction." *United States ex rel. Williams* v. *LaVallee*, supra at 647.

mine whether the impact of questioning is better adapted to wear down the accused's will to resist when it is spread over a period of several days, producing a steady abrasion, or whether a single protracted session with fatigue and despair increasingly allied with the inquisitor, will more readily extort a confession. Williams was subject to the latter, Turner to the former, for about the same amount of time. Neither was advised of his right to counsel or his right to remain silent. Moreover, Williams was less able to withstand protracted questioning because of his poor health and comparative youth. Turner's confession was held to have been coerced; Williams presents a situation at least equally compelling.

In *Haley* v. *Ohio*, 332 U.S. 596 (1948), a 15-year old boy confessed after 3 hours questioning when confronted with false confessions made by alleged accomplices. He was not advised of his right to counsel and to remain silent until the signing of the confession. Though Williams was three years older, he was interrogated four times longer than Haley, likewise not advised of his rights, and the immediate occasion of his confession was likewise an impermissible inducement. The Supreme Court found that Haley's confession should have been excluded and the conclusion logically extends to Williams as well.

The accused in *Spano* v. *New York*, *supra*, was 25 years old, foreign born but with some high school education. He had surrendered to the police on the advice of an attorney whom he had retained. His lawyer also quite wisely advised him to remain mute when questioned. After only 8 hours of interrogation, marked by appeals to the accused

to confess from a childhood friend then on the police force, Spano confessed. He had not been allowed to consult with his attorney, but presumably was aware of his right to one, and specifically had been advised of his right to remain silent, as Williams had not been. He had a history of emotional instability, but Williams was also maladjusted and considerably younger. In finding the confession to have been the product of impermissible coercion, the Supreme Court emphasized the accused's fatigue after 8 hours of interrogation. If such be the case, the 24 hours of continuous interrogation under the more adverse circumstances that produced Williams' confessions can be nothing else than coercion as a matter of law.

In *Haynes* v. *Washington*, *supra*, there was no claim of physical abuse, deprivation of food or rest, or uninterrupted long periods of questioning. The accused was a mature individual who had a record of previous contacts with the police. Haynes confessed his crime once to the arresting officers on the way to the police station, again after ½ hour of questioning that evening, and again during 1½ hours of questioning the next morning. The last confession was signed that afternoon, 16 hours after arrest, and admitted in evidence. This confession was held to have been coerced through the combination of a threat of continued detention and the promise that defendant could see his family if he confessed. This pressure fails far short of that to which Williams was subjected for a longer period of time, and with less ability to resist. It would be little short of irrational to contend that Haynes' confession was coerced while Williams' was not.

*Opinions of the United States Court of Appeals in and for the Second Circuit dated October 4, 1963*

Finally, turning to decisions of this court, although other cases from the Supreme Court might be noted (see also *Culombe* v. *Connecticut*, 367 U.S. 568 (1961); *Fikes* v. *Alabama*, 352 U.S. 191 (1957); *Malinsky* v. *New York*, 324 U.S. 401 (1945)), we find further corroboration of our conclusion. In *United States ex rel. Caminito* v. *Murphy*, 222 F. 2d 698 (2 Cir.), cert. denied 350 U.S. 896 (1955), the accused was an adult with no prior arrests or convictions. He was interrogated for five hours, starting three hours after his arrest, allowed an eight hour rest in an unheated (it was May, however) and sparsely furnished cell, then interrogated another eleven hours until he confessed. Detectives masquerading as witnessed pretended to identify him. We held the confession thus secured from Caminito to be the product of coercion rather than free will. Adherence to this decision demands the same conclusion for Williams' confessions.

The record of events leading to Williams' confessions yields practically every one of the factors found relevant in the cases cited above in determining whether a confession has been coerced or not. He was subjected to a long and exhausting interrogation by relays of questioners. Perhaps he did not hold out as long as some have, but it was longer than others were able. Compare *Ashcraft* v. *Tennessee*, supra (36 hours of interrogation) with *Spano* v. *New York*, supra (8 hours of interrogation). Moreover, his weakened physical condition and relative youth must form a part of the calculation of what period of questioning would have been permissible. See *Haley* v. *Ohio*, supra. Nor was he advised of his right to legal counsel or of his privilege to remain silent, both common factors in many cases. See

e.g., *Turner* v. *Pennsylvania*, supra. There was a long delay in arraignment, demonstrating a callous attitude toward the legal rights of the accused on the part of the police. *Culombe* v. *Connecticut*, supra. While he was questioned, Williams was held incommunicado despite his efforts to see his mother, the natural person to whom he would turn, and it was the veiled promise that this request would be granted which was the final inducement to confession. See *Haynes* v. *Washington*, supra. Finally, when at last brought before a magistrate, he pleaded not guilty, an almost immediate repudiation of the confession which had been wrung from him. See *Ashcraft* v. *Tennessee*, supra. A confession obtained by these methods cannot be introduced against an accused consistently with the constitutional guarantee that his life and liberty may not be taken from him without due process of law. Events have made it plain that the innocent as well as the guilty will, on occasion, yield to psychological pressure expertly applied. To protect the innocent the use of products of such pressure must be denied in all cases. While it is the rule stated in the cases, and most recently reiterated in *Haynes* v. *Washington*, that the issue of voluntariness is one of ultimate fact, to be determined from the undisputed historical facts, with due weight given to a verdict on the issue by a jury which has observed the witnesses, the cases unmistakably teach that pressures such as those here employed require a ruling of coercion as a matter of law.

We express our appreciation to Pasco M. Bowman II, counsel assigned to represent Williams on this appeal, for services which have been performed in accordance with the best traditions of the bar.

As there was no evidence against Williams at the trial, other than the confessions which we now hold to have been inadmissible, a retrial may be unlikely. If, however, the State should desire one 16 years after the crime, it should be had promptly. We reverse the order appealed from denying the petition for the writ and direct that the writ be issued at once, requiring release of relator unless promptly retried on the indictment.

Order reversed with directions to issue the writ applied for.

LUMBARD, Chief Judge—Concurring:

Following the mandate of the Supreme Court expressed in Haynes v. Washington, 373 U.S. 503 (1963) and earlier cases discussed in Judge Smith's opinion, we are compelled to nullify the administration of criminal justice by the State of New York whereby Samuel Titto Williams was found guilty of murder in the first degree in beating to death a 15-year old girl who discovered him burglarizing the bedroom in which she and her younger brother were sleeping. A reading of the record amply confirms the opinion of Mr. Justice Black, expressed when this case was before the Supreme Court on another question, that: "The evidence proved a wholly indefensible murder committed by a person engaged in a burglary", 377 U.S. 241 at 243 (1949). It is almost certain that as a result of our action, taken more than 16 years after the murder, Williams will escape justice for the taking of a life; worse still, he may be set free to endanger others.

We prohibit New York from using Williams' confession because it has been established by the Supreme Court that

Williams' right to due process at the hands of the state prohibits the use of a confession obtained only after some 18 or 19 hours of detention and continuous questioning by the police. The undisputed circumstances of such detention and questioning are now considered to be so inherently coercive as to support by themselves the claim that Williams' confession was not voluntary. It follows that the state may not use the confession in a criminal proceeding.

Cases such as this raise a very serious question, whether the states are powerless to make the kind of inquiry which will bring to justice those who rob at night and murder their victims leaving no witness who can identify them. As a judge who must pass upon these cases where federal court intervention is sought, I cannot concur without pointing out that the courts have been left to make rules and apply constitutional standards with little, if any, real knowledge or guidance regarding the difficulties which face the police in solving such crimes in our crowded metropolitan centers. Moreover, Congress and the legislatures have failed to make appropriate inquiry and statutory provision to meet the situation.

Statistics issued by highly respected agencies of federal, state and city governments consistently remind us that there has been and continues to be a disturbing increase in crimes of violence, especially in the large cities, and that an increasing percentage of these crimes remains unsolved and unpunished. Is the increase in crime due in part to the fact that an increasingly smaller percentage of serious crimes is being solved? Why is it becoming more and more difficult to protect the public against such crimes

of violence? Is it because it has become more difficult in recent years to obtain sufficient evidence of guilt? Have federal court decisions protecting individual constitutional rights made it unduly difficult for law enforcement agencies?

We should not continue to disregard these similar pertinent problems. No society organized under law would be worthy of the name if it could not afford adequate protection against crimes of violence to its law-abiding citizens. In the long run no community will tolerate a situation where its citizens are fearful of going upon the streets alone at night, where a knock on the door strikes terror in defenseless householders and where a citizen feels that to protect himself and his family he must be prepared to take the law into his own hands. Before any self-respecting community permits such a condition to develop it will re-examine its administration of criminal justice, and even constitutional safeguards as the courts have construed them, lest in the desire to protect individual rights the larger and greater rights of all the people to be secure in their persons and in their homes becomes secondary.

Is it not possible for the states to study and adopt measures which would better protect suspects against coercive and improper police conduct during detention and at the same time give the police adequate time and proper means for investigating serious crimes, particularly murder?

Here a night prowler entered a backyard sometime after 1 A.M. on April 20, 1947, armed himself with an iron bar, forced open a window and entered the Graff apartment on the ground floor of 143 East 96th Street in the Browns-

ville section of Brooklyn. He was ransacking the bedroom when 15-year old Selma Graff woke up and grappled with him. He took the 2-foot iron bar and beat her into unconsciousness; she died a few hours later. Although Selma's 10-year old brother knew what was happening in the darkened room he could not identify the assailant. The killer fled, leaving behind the iron bar, a flashlight wrapped in orange paper, and a twig torn from a bush in the yard and used to hold down the window shade.

More than four months after the murder, at 2:30 A.M. on September 8, 1947, a police patrol operating about one-half mile from the Graff neighborhood noticed Williams coming from a back alley off Howard Avenue. The police had earlier been informed that a prowler had been seen in this vicinity. Since there had been many unsolved robberies in these neighborhoods, as is apparent from the record, particularly from cross-examination of Williams at his trial, and since Williams' explanation of his presence on Howard Avenue was apparently unsatisfactory, the police took him into custody and found a pencil flashlight in his possession.[1]

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[1] Williams was specifically questioned about several robberies all of which he denied. Of course the state had to tread very lightly on this subject. For this reason the record is very bare of details regarding the police activities and matters concerning which Williams was questioned in the 10-hour interval between arrest and the time when reference was first made to the entry of the Graff apartment. The district attorney's brief at page 30, spells out what the record strongly hints at:

> "Williams was apprehended under suspicion of having committed a number of burglaries. The police were occupied during the daytime hours of September 8th in the investigation of these burglaries. The sole clue which they had concerning his commission of the Graff murder was the orange paper-covered

Williams was then taken to the apartment where he was boarding, at 122 Sutter Avenue, where the police apparently found in his room numerous articles which supported their suspicions. Williams had no employment at the time and had not been working for many weeks. The police took him to a nearby station house where he was questioned by patrolmen and by detectives. Apparently numerous people were called to the station house to see whether they could identify Williams or some of the objects found in his room. This procedure took many hours as the persons involved had to be located at home or at their places of work. It was the strategy of the police—quite understandable under the circumstances—first to question Williams about other burglaries before asking him about the entry of the Graff apartment, and it was not until sometime after 7:00 P.M. that any questions about the Selma Graff murder were put to Williams.

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flashlight. It was therefore not only normal, but excellent, police procedure to refrain from questioning him concerning the murder until they had other evidence,—conclusive evidence,—with which to confront him in relation to the major crime. This course of procedure, however, could not be disclosed by the prosecution on the trial."

Of course all the circumstances surrounding the arrest, detention and questioning of Williams, and further investigation and confrontation relevant thereto, might have been very material on the question of the reasonableness of Williams' detention and why he was not sooner arraigned. The district attorney could have asked the district judge to take evidence as to these matters, or the district judge might himself have requested testimony and evidence on this subject. If in the light of our opinions the district attorney feels that evidence may still be adduced to these matters and that there is a possibility that the result would be different, I, for one, would favor remanding the case for that purpose, meanwhile withholding decision on the writ.

The police now have little or no guide either under New York law or federal court decisions from which they can determine with any safety how long they may detain and question a suspect under such circumstances as we find here. That there was good reason to detain and question Williams is abundantly clear. Anyone prowling in a back alley at 2:00 A.M., with a pencil flashlight, some distance from his own home, in a neighborhood where numerous robberies have been reported, ought to be detained and questioned. The process of questioning is futile unless it can be done in some privacy, and where all relevant information is available, so that the suspect may be confronted with minimum delay. Such measures are necessary to apprehend violators and indeed in order to clear suspects of suspicion.

Law enforcement authorities ought to be empowered to question, to test, to confront and to identify witnesses and suspects for some reasonable period of time. Anything less than such means of inquiry would render the police powerless to protect the public.

Of course one who chooses not to speak may not be compelled to do so. However, the fact is that with but rare exceptions even those with criminal records or associations usually are willing to answer questions put to them by police authorities.[2] Even answers which are false or only partly truthful may be of great value in the process of

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[2] See, for example, United States v. Bufalino, 285 F. 2d 408 (2 Cir. 1960), where, of 58 persons who were stopped for questioning about their meeting at Joseph Barbara's estate in Appalachin, New York, in 1957, only one refused to answer any questions at all. Of the 58, about 25 had police records. See also United States v. Vita, 294 F. 2d 524 (2 Cir. 1961), cert. denied, 369 U.S. 823 (1962).

investigation, just as they are useful in cross-examination upon trial.

There is nothing immoral or unreasonable in expecting that many suspects, when confronted with incriminating evidence, or with someone who identifies them will admit their transgressions. All of the world's great religions teach in one form or another that confession is good for the soul and that by making confession one may be absolved, in part at least.[3] Ever since 42 B.C. it has been a maxim that "Confession of our faults is the next thing to innocency."[4] A duty to confess is ingrained in all of us to some extent, so much so that to many people telling the truth and "coming clean" satisfies a basic spiritual need of one who has transgressed and provides a measure of relief. Nor is it improper or immoral for police officers, under a duty to solve a crime, to urge a suspect to tell what he knows. These considerations give strong support to allowing law enforcement officers to question a suspect and to letting him know the case against him or the matters needing explanation, so that the witness or suspect may explain if he can. They may appeal to such person to assist them in the solution of a crime by telling what he knows even though he may incriminate himself. The Fifth Amendment does not command that no one shall be asked or permitted to answer questions because he might thereby incriminate himself; the Amendment merely prohibits the government from compelling any one to incriminate himself.

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[3] Romeo and Juliet, Act II, sc. 3, line 56. See also Psalms 32:5; James 5:16; I John 1:8.

[4] Maxims of Publilius Syrus, No. 1060, Bartlett's Familiar Quotations, 13th ed., 1955, page 406.

Reasonable means of detention and private interrogation should be permitted where, as here, there is probable cause to believe that the person detained has been engaging in certain specific criminal activity. At the same time perhaps even this much ought not to be permitted unless the suspect be protected from undue pressures and improper treatment. Experience has taught us that all too often we cannot trust law enforcement agencies themselves to be fair judges of what is proper detention and treatment of persons who are completely within their power and without means of summoning aid or even someone to witness their situation. Usually the only witness for the suspect is himself. While there is good reason to believe that objectionable third-degree practices are not as widespread now as they were in 1947 and earlier, it would seem that no detention or questioning beyond a few hours is desirable without the supervision of some independent quasi-judicial authority.[5] Obviously in murder cases and under the circumstances here attendant there would be good reason for a commissioner or magistrate to authorize further detention of a suspect such as Williams, perhaps requiring some careful record of police activity during continued detention and even the presence of some appropriate impartial observer.

Here there is no doubt that Williams' claims of brutality and torture were greatly exaggerated. But at the least it is

[5] See New York Code of Criminal Procedure §165, which requires that the defendant be taken before the magistrate "without unnecessary delay." Only a few states have statutory provisions which set out more extensive requirements for arrest procedure. See Warner, The Uniform Arrest Act, 28 U. Va. L. Rev. 315 (1942); N.H. Laws, 1941, c. 982; R.I. Pub. Laws, 1941, c. 103.

difficult to believe that the conduct of the police did not place him in very real fear of brutality and ill treatment, sufficient to raise a serious question regarding the volutariness of his confession. It is far safer for society to resolve the doubt in such cases in favor of the detainee and to bar his confession; without such a rule of law there would be little or no protection against coerced confessions. But this does not mean that our law enforcement agencies must remain powerless to make adequate investigations.

In my opinion there is reason to believe that careful exploration of means to reconcile the requirements of due process and the necessity adequately to investigate and solve an increasing number of crimes of violence would produce methods far more satisfactory than those in present use. Were the state legislatures and the Congress to conduct such inquiries and enact appropriate measures the courts would be under a duty to favor them with a strong presumption of propriety and to abstain from substituting their own untutored ideas and personal views about what is proper and necessary in law enforcement. At least it would seem that methods worked out by the legislative branch of the government would be entitled to a fair trial period.

My concurrence in our action is reluctant for another reason. Whether or not Williams is guilty of the charge of murder, there is surely grave doubt in view of his record and past medical history that he should be at liberty and free possibly to molest and injure others, to rob homes and to assault those who may resist him. I doubt whether New York State now has available means adequately to safe-

guard the public by detaining persons like Williams until it is reasonably clear that they will not repeat prior infractions. There have been altogether too many instances where unconditional release of a dangerous criminal or a person of criminal tendencies has had disastrous consequences to other innocent law-abiding citizens.

If it is desirable and possible to bring any proceeding to commit Williams[6]—which, of course, must take into account his history during the 16 years since his arrest in September 1947—it may be that the state should be permitted —at least so far as possible federal court intervention is concerned—to use as evidence Williams' confessions which we have barred the state from using in this criminal proceeding. If it can be shown that Williams is a disturbed person whose freedom is fraught with danger to others, his detention in an appropriate institution would not be for the purpose of punishing him for crime. In that case his detention pursuant to state law would be to protect the public and, indeed, to protect Williams himself from the consequences of further criminal acts. While the use of such evidence in a commitment proceeding would be for the determination of the New York courts in the first instance, I know of no specific federal court case holding which would preclude the state from using Williams' confessions to impose restraints on him in state proceedings which do not seeek criminal sanctions.

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[6] See New York Mental Hygiene Law §§ 71 et seq., 87, 121 et seq. It is doubtful whether any law enforcement authorities have the power to institute such proceedings themselves.

**Opinion of the United States District Court for the Southern District dated November 8, 1962 Denying and Dismissing Petition for Writ of Habeas Corpus**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

62 Civ. 2428

[SAME TITLE]

MEMORANDUM

DAWSON, D. J.:

This is a petition for a writ of habeas corpus arising out of a conviction of first degree murder in the State of New York. The petitioner was found guilty of felony murder by a jury on January 22, 1948 in the County Court of Kings County. Sentence was imposed on March 2, 1948 by County Court Judge Goldstein who had presided at the trial. Based upon probation department reports which disclosed a criminal background, Judge Goldstein rejected the recommendation of the jury that the petitioner be sentenced to life imprisonment and instead imposed the death sentence.

The Court of Appeals of New York affirmed the conviction without opinion (*People of the State of New York v. Williams*, 298 N.Y. 803), amended its remittitur (298 N.Y. 863) and denied motion for reargument (300 N.Y. 460). The case then went to the United States Supreme Court on the narrow issue of whether it was constitutional for a trial judge to base sentencing upon the report of witnesses that the defendant had not cross-examined or confronted. The Supreme Court rejected the challenge and affirmed the Court

of Appeals of New York. *Williams* v. *People of the State of New York*, 337 U.S. 241 (1949); *rehearing denied* 337 U.S. 961 and 338 U.S. 841. In November 1949 Governor Dewey commuted the death sentence to life imprisonment.

No further legal action was undertaken until the petitioner filed a petition for habeas corpus in 1958 in the Northern District of New York. *United States* v. *LaVallee*, 170 F. Supp. 582 (N.D.N.Y. 1959). The petition was opposed by the State of New York on two grounds: (1) there was no merit in petitioner's claim and (2) petitioner had failed to exhaust his state remedies.*

Judge Foley rejected the latter argument of the State of New York and denied the petition on the merits. A certificate of probable cause was granted and petitioner appealed to the Court of Appeals, Second Circuit. 276 F. 2d 645 (2d Cir. 1960). The court did not consider the merits of the controversy but affirmed Judge Foley's denial of the petition on the ground that the prisoner had not exhausted his state remedies.

The United States Supreme Court denied a writ of certiorari. 364 U.S. 922 (1960). The Court of Appeals of New York then denied petitioner's motion for reargument of the original appeal. 11 N.Y. 2d 888 (1962). Petitioner next sought a writ of certiorari based on New York's failure to hear reargument. This was likewise denied. 370 U.S. 960 (1962). A motion was also made to the Kings County Court which denied petitioner's motion in the nature of coram nobis to vacate the judgment.

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* 28 U.S.C.A. § 2254.

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Petitioner now brings the instant petition for a writ of habeas corpus and the State of New York, while opposing the petition on its merits, does not now claim that the petitioner has failed to exhaust his state remedies.

The question raised by this petition is not a novel one. It seeks to show that the confession given by the defendant and used against him at the trial was coerced and therefore inadmissible. Petitioner also claims that there was illegal delay in arraignment and that his lack of counsel at his first arraignment rendered the entire trial invalid.

The record of the trial of the petitioner fills two bound volumes. In addition, there are briefs submitted to the New York Court of Appeals, including one by the American Civil Liberties Union as amicus curiae in behalf of the petitioner, the transcript of record filed in the United States Supreme Court on appeal and the opposing briefs and the two petitions for rehearing. Lastly, there are the affidavits of petitioner and the State of New York.

In compliance with the opinion of the United States Supreme Court in *Brown* v. *Allen*, 344 U.S. 443 (1952), this court has examined the transcript of the state proceedings. Since the record in this instance affords an adequate opportunity to weigh the sufficiency of the allegations and the evidence, there is no necessity for a hearing on the application for a writ of habeas corpus. *Brown* v. *Allen*, *supra*, at page 463. See *Application of Jackson*, 206 F. Supp. 759 (S.D.N.Y. 1962), *aff'd* F. 2d

While much of what transpired is in dispute, certain facts remain unchallenged. The petitioner was tried for the mur-

der of a fifteen year old girl which took place on the night of April 19, 1947. A burglar entered the premises and began to rifle the contents of a dresser. The girl, who was asleep, awakened and attacked the prowler. He responded by beating her over the head with an iron bar. The girl never regained consciousness and died several hours later in the hospital. Her younger brother, aged 10, also awoke and was struck by the burglar as he lay in bed.

In the following months a number of burglaries took place in the same section of Brooklyn. The entire area was under surveillance by the police for that reason. Petitioner was taken into custody on September 8, 1947 in the early hours of the morning. He was brought to the police station and was kept in custody until his arraignment before a magistrate in Felony Court at about noon on September 9, 1947. During the 34 hours that the petitioner was in the custody of the police he twice confessed to the murder. After extensive questioning petitioner wrote his own longhand confession. Then an assistant district attorney was summoned, together with a stenographer, and a detailed statement was taken from petitioner. In the company of the police and the assistant district attorney, the petitioner was taken from the station house to reenact the crime at the scene.

It is during the period of time in the custody of the police that the petitioner claims he was unmercifully beaten and tortured. This was denied by the assistant district attorney and all the police officers who took the stand. The police do not deny that the petitioner went without sleep

for the entire period and that his consumption of food and drink was not extensive.

When the petitioner was first brought to the police station he was not questioned about the murder. Instead, the police concentrated their questions on the various burglaries that had taken place in the neighborhood. At one point petitioner was takn by automobile to the scenes of various crimes in the hope that someone could identify him as the perpetrator.

The interrogation concerning the homicide commenced at about 6:00 P.M. on September 8, 1947 and a longhand confession was obtained within about four hours. At this point the district attorney's office was called and petitioner gave a detailed statement at about midnight.

At the trial petitioner took the witness stand and testified at great length concerning the alleged police brutality. Petitioner exhibited to the jury the bruises and scars which he stated remained as a result of the alleged beatings. In rebuttal to this contention the police and assistant district attorney testified as to the lack of any coercion. Further, there was testimony of the admittance clerk of the Raymond Street jail to which petitioner was committed following his arraignment in Felony Court. According to that testimony petitioner complained only of swollen legs caused by rheumatic fever. There was also testimony by the jail physician who examined the petitioner and while he did find some injuries, these were inconsequential when compared to the torture described by the petitioner. Defense counesl introduced a series of photographs taken of

petitioner on September 20, 1947. This was a result of an order signed by Judge Leibowitz of the County Court when petitioner was arraigned in that court on September 12th.

The charge to the jury fully explained the applicable law:

> "A confession of a defendant, whether in the course of judicial proceedings or to a private person can be given in evidence against him, unless made under the influence of fear produced by threats or unless made upon a stipulation of the District Attorney that he shall not be prosecuted therefor; but it is not sufficient to warrant his conviction without additional proof that the crime charged has been committed . . .
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> "If you decide that such confession or admission was made as the result of fear induced by threats, duress, or violence, or induced by unnecessary and illegal delay in arraignment, the confession so obtained cannot be used against the defendant and is to be disregarded even if you believe it to be true. No confession is admissible unless it is voluntary. Its primary meaning imports a condition of mind that is free and unconstrained by fear, or inspired by false hope, or threats or violence, or by illegal and unnecessary delay in arraignment. At any rate, it is a question of fact for you, the jury, to determine. You must also determine and decide, if you do accept such confessions and decide that it was made voluntarily, whether or not the confessions are true. Of course, if you decide that the confessions were not voluntary or not true, you must acquit the defendant." Trial Record, pp. 1143-46.

*Opinion of the United States District Court for the Southern District dated November 8, 1962, Denying and Dismissing Petition for Writ of Habeas Corpus*

At the conclusion of this charge two of the three counsel appointed by the court to defend petitioner found no exception to the charge as given. One requested that additional instruction be given on the issue of coercion and the trial judge so instructed the jury. At this point all counsel in the case were satisfied that the jury had been correctly instructed on this matter.

The burden of proof placed upon a petitioner for a writ of habeas corpus is set out by the United States Supreme Court in *Brown v. Allen, supra*:

> "As the burden of overturning the conviction rests on the applicant, he should allege specifically, in cases where material, the uncontroverted evidentiary facts appearing in the record upon which is based his allegation of denial of constitutional rights." 344 U.S. 443, fn. p. 458.

The need for a lack of conflict on the record was again pointed out later in the same opinion.

> "In determining whether a confession has been used by the state in violation of the constitutional rights of a petitioner, a United States court appraises the alleged abuses by the facts as shown at the hearing or admitted on the record." 344 U.S. 443, at p. 475.

All the State of New York must show in support of its contention that the petition for a writ of habeas corpus be denied is that a jury upon correct instructions could reasonably find that the confession was not coerced. This

is what the United States Supreme Court stated in *Lyons* v. *Oklahoma*, 322 U.S. 596 (1942):

> "Review here deals with circumstances which require examination into the possibility as to whether the judge and jury in the trial court could reasonably conclude that the McAlester confession was voluntary. The fact that there is evidence which would justify a contrary conclusion is immaterial. To triers of fact is left the determination of the truth or error of the testimony of the prisoner and official alike . . . " 322 U.S. 596, at p. 603.

The issue of coercion was fairly presented to the jury under proper instructions. The function of a federal court is not to sit as a super-jury and as such to conclude that the confession was coerced. *Stein* v. *New York*, 346 U.S. 156, 180 (1953).

When the United States Supreme Court heard argument in this case, it was on the narrow issue of the constitutionality of the sentencing procedure employed by the State of New York. In passing upon that question the whole record was apparently read. While the Court was not making a determination on the merits, it is significant that Mr. Justice Black, speaking for the Supreme Court, stated:

> "The narrow contention here makes it unnecessary to set out the facts at length. The record shows a carefully conducted trial lasting more than two weeks in which appellant (Williams) was represented by three appointed lawyers who conducted his defense with fidelity and zeal. The evidence proved a wholly

> indefensible murder committed by a person engaged in a burglary . . .
>
> . . . . .
>
> "Appellant was found guilty after a fairly conducted trial . . ." *Williams* v. *People of State of New York*, 377 U.S. 241, at pp. 243; 252.

Judge Foley also passed on the merits of the original petition for habeas corpus and vacated the petition at that time. This was not technically a determination on the merits since the Court of Appeals for the Second Circuit in affirming the denial did so on the ground that the petitioner had not exhausted his state remedies. Judge Foley summed up his analysis of the record as follows:

> "To me, this is another example of a sharp dispute of fact with adequate support in the record for the State to prevail in its position that the confessions were freely and voluntarily obtained. Again, I cannot add up a combination of undisputed factors that reasonably lead me to the conclusion that coercion and intimidation have been demonstrated with such degree of clarity as to sustain this petition and void the judgment of conviction.
>
> "It is important to my reasoning and conclusion that the trial of this petitioner was conducted as fairly as any Judge, state or federal, in the country could conduct it. The charge unequivocally explained the law as to coerced and involuntary confessions, and instructed the jury specifically that if they had reasonable doubt as to the voluntariness of the confessions they should acquit the defendant. The most eminent criminal counsel assigned by the Courts of New York took no exception to the charge, and

the several requests to charge elaborated again upon the issue of coercion and intimidation and were charged without hesitation or qualification by the Judge." *United States* v. *LaValle*, 170 F. Supp. 582, at pp. 585-86.

It is stipulated by petitioner and the State of New York that petitioner was in the custody of the police for a period of 34 hours before his arraignment in Felony Court. The effect of such delay was passed upon in *Brown* v. *Allen*, *supra*, at page 476:

". . . If the delay in the arraignment of petitioner was greater than that which might be tolerated in a federal criminal proceeding, due process was not violated. Under the leadership of this Court a rule has been adopted for federal courts, that denies admission to confessions obtained before prompt arraignment notwithstanding their voluntary character. *McNabb* v. *United States*, 318 U.S. 332; *Upshaw* v. *United States*, 335 U.S. 410. Cf. *Allen* v. *United States*, 91 U.S. App. D.C. 197, 202 F. 2d 329. This experiment has been made in an attempt to abolish the opportunities for coercion which prolonged detention without a hearing is said to enhance. But the federal rule does not arise from constitutional sources. The Court has repeatedly refused to convert this rule of evidence for federal courts into a constitutional limitation on the states. *Gallegos* v. *Nebraska*, 342 U.S. 55, 63-65. Mere detention and police examination in private of one in official state custody do not render involuntary the statements or confessions made by the person so detained. Petitioner's constitutional rights were not infringed by the refusal

of the trial court to exclude his confessions as evidence."

The trial court in the instant case, however, went beyond the dictates of the United States Supreme Court in charging the jury concerning the effect of an illegal or unnecessary delay in arraignment.

> "You have heard reference made during the course of this trial to the delay in the arraignment of the defendant. Under our law, the defendant must in all cases be taken before the Magistrate without unnecessary delay. . . .
>
> "No confession is admissible unless it is voluntary. Its primary meaning imports a condition of mind that is free and unconstrained by fear, or inspired by false hope, or threats of violence, or by illegal and unnecessary delay in arraignment." Trial Record, pp. 1144-46.

Petitioner's final contention concerns his lack of counsel at the arraignment. The United States Supreme Court recently addressed itself to this issue. *Hamilton* v. *Alabama*, 368 U.S. 52 (1961). The opinion states that in a capital case in the State of Alabama an indigent accused is entitled to appointed counsel at every stage of the proceeding, including arraignment. The opinion of the Court makes it clear that the decision rests in large measure on the law of Alabama which denies a defendant certain defenses unless they are pleaded at the arraignment;

> "Arraignment under Alabama law is a critical stage in a criminal proceeding. It is then that the defense

> of insanity must be pleaded (15 Ala. Code § 423), or the opportunity is lost. *Morrell* v. *State*, 136 Ala. 44, 34 So. 208. Thereafter that plea may not be made except in the discretion of the trial judge, and his refusal to accept it is 'not revisable' on appeal. *Rohn* v. *State*, 186 Ala. 5, 8, 65 So. 42, 43. Cf. *Garrett* v. *State*, 248 Ala. 612, 614-615, 29 So. 2d 8, 9. Pleas in abatement must also be made at the time of arraignment. 15 Ala. Code § 279. It is then that motions to quash based on systematic exclusion of one race from grand juries (*Reeves* v. *State*, 246 Ala. 476, 88 So. 2d 561), or on the ground that the grand jury was otherwise improperly drawn (*Whitehead* v. *State*, 206 Ala. 288, 90 So. 351), must be made." 368 U.S. 52, at pp. 53-54.

Under New York procedure petitioner was arraigned twice; in Felony Court before a Magistrate and three days later in County Court. Petitioner admits that at the second arraignment he was represented by private counsel hired by his mother and approved of by petitioner. See pages 734-740 and 913-929 of the trial record.

It is agreed that petitioner was not represented by counsel at his first arraignment in Felony Court. Petitioner testified that at that arraignment he was advised that he had a right to counsel and a right to communicate with counsel and with friends and relatives. Petitioner was also advised that he could secure an adjournment to obtain counsel if he desired. (Pages 948-959 of the trial record).

The first arraignment in New York is essentially a committing procedure which allows the state to confine an ac-

cused prior to an indictment being handed down. There must be some stage where an accused who does not have counsel is advised of his right to secure one. This was done at the arraignment in Felony Court. By the time the indictment was handed down the defendant had had a conference with his private attorney. (Trial record, page 919).

This first arraignment is not "a critical stage in a criminal proceeding." * No defenses are waived by a failure to plead them at this stage in the proceedings. Since petitioner was assisted by counsel at his second arraignment his constitutional rights were not abridged and his conviction must be upheld.

The petition for habeas corpus is denied. The papers herein shall be filed without the usual requirement for the prepayment of fees. A certificate of probable cause is hereby granted to allow petitioner to review this decision in the Court of Appeals, Second Circuit. The bound volumes furnished by the District Attorney of Kings County shall be returned to him to be supplied to the Court of Appeals if review of this decision is taken by the petitioner.

So ordered.

Dated: New York, N. Y.
November 8, 1962

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U. S. D. J.

* Hamilton v. Alabama, 368 U.S. 52, at p. 54.